defense UPDATE

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THE IMPACT OF *HARO V. SEBELIUS*: A SUCCESSFUL CHALLENGE TO MEDICARE'S RECOVERY PRACTICES

By Jill Gradwohl Schroeder, Baylor, Evnen, Curtiss, Grimit & Witt, LLP, Lincoln, NE

They prevailed. Two Medicare beneficiaries and a plaintiffs' lawyer successfully challenged Medicare's recovery practices. The Court decision finding in favor of the Medicare beneficiaries and the attorney resulted in significant changes to the process Medicare uses to recover money from personal injury settlements. Medicare continues to refine its recovery procedures, in light of that decision and on a broader scale. Practitioners should understand the issues raised in that litigation, the changes that have taken place following that Court ruling, and that federal legislation has been proposed to respond to concerns Medicare beneficiaries and primary payers have about Medicare's right of recovery as to personal injury claims.

In a Nutshell

In *Haro v. Sebelius*, the Medicare beneficiaries challenged Medicare's practice of demanding prepayment of conditional payment recovery from a personal injury settlement even when the Medicare beneficiary appealed or sought a waiver of Medicare's recovery claim.[1] The attorney took issue with Medicare's assertion that it should be paid out of personal injury settlement proceeds before any distribution occurred.

On May 5, 2011, the United States District Court for the District of Arizona granted a Motion for Summary Judgment in favor of the Medicare beneficiaries and attorney. It declared the practices used by the Secretary of the Department of Health and Human Services to be beyond her statutory authority, and enjoined her from engaging in those practices.

During the summer of 2011, the Secretary, through the Centers for Medicare & Medicaid Services (CMS), revised its conditional payment letters to fall in line with the *Haro* decision. CMS no longer demands immediate payment from Medicare beneficiaries while the reimbursement amount is pending on appeal or a request for waiver has been made by the Medicare beneficiary. Also, Medicare can no longer hold plaintiff attorneys financially responsible for reimbursement under the Medicare Secondary Payer Act or hold all settlement sums until Medicare conditional payment issues are resolved.

Medicare Conditional Payment Process

For those who are not familiar with the Medicare Secondary Payer Act,a brief explanation may be of benefit. Medicare is a federally funded program that provides health insurance to people who are age 65 or older and those who are disabled or suffer from end stage renal disease.[2] The Medicare Secondary Payer Act establishes Medicare as a "secondary payer" to certain other insurance plans, such as liability, workers' compensation, no fault and med pay insurance.[3] For accident-related medical expenses, these insurance plans or self-insured entities are primary to Medicare.

Medicare may pay medical bills related to a personal injury claim if prompt payment is otherwise not expected to be made. Those payments by Medicare are "conditional" because Medicare expects to be repaid when there is a settlement, judgment, or award as to the claimed injuries. CMS uses a contractor, the Medicare Secondary Payer Recovery Contractor (MSPRC), to recover

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accident-related conditional payments.

Once Medicare is informed about an accident or injury suffered by a Medicare beneficiary, it will review the payments it has made to determine whether it has paid any accident-related medical bills. If Medicare intends to seek recovery of any accident-related payments, it develops a list of those medical expenses for which recovery is being sought.

The Medicare beneficiary has an opportunity to appeal from the conditional payment recovery asserted. The beneficiary can provide information to Medicare if the beneficiary believes charges included on Medicare's claimed recovery were unrelated to the alleged accident or have already been paid by the primary payer. A Medicare beneficiary also has an option to request that Medicare waive recovery of conditional payments it has made. Medicare may waive its recovery in limited situations if waiver is in the best interest of the Medicare program, when the beneficiary demonstrates having to repay Medicare would produce a financial hardship on the beneficiary, or if recovery would be against equity and good conscience.

Information about the conditional payment process is available on the website of the MSPRC at: www.msprc.info

A Closer Look at the Issues Raised in *Haro*

In the *Haro* case, each of the Medicare beneficiaries who brought suit against the Secretary of the United States Department of Health and Human Services had pursued an auto accident claim as to which Medicare had paid some of the medical bills. Prior to the *Haro* decision, CMS demanded reimbursement of its conditional payments within 60 days after the beneficiary received settlement proceeds, even if an appeal or waiver request was filed by the beneficiary. The beneficiaries argued it was improper for Medicare to demand payment pending a determination as to whether the appeal or request for a waiver would be successful.

In *Haro*, the Medicare beneficiaries also sought certification of a class because the practice of demanding payment even in the face of an appeal or request for waiver was applied as to all beneficiaries. The Court agreed it was appropriate to certify the class affected by Medicare's practices as "persons who are or will be subject to MSP [Medicare Secondary Payer] recovery, and from whom defendant [CMS] has demanded or will demand payment of MSP claims before there have been determinations of the correct amounts through the waiver or appeal process."

On behalf of the class, the beneficiaries sought a declaratory judgment that the Secretary's practices in requiring prepayment of a reimbursement claim prior to the appeal process or waiver request running its course was not authorized by Congress, did not constitute a permissive interpretation of the Medicare Secondary Payer Act, and violated the Due Process Clause of the United States Constitution. The Medicare beneficiaries also sought a Court order enjoining the Secretary's practices. In granting the Medicare beneficiaries' Motion for Summary Judgment, the Court found statutory support for its decision. It did not reach the Due Process arguments raised by the plaintiffs.

The Court explained that once there was a settlement or judgment, the primary payer's [insurance carrier's or self insured entity's] reimbursement to Medicare was due and owing. At that point, if the primary payer didn't reimburse the federal government within 60 days, an action for double damages could be initiated against the primary payer.[4] The Medicare beneficiary was positioned differently because of the ability to request a waiver of Medicare's recovery or appeal from the amount claimed. The Court concluded the Secretary's practice of requiring reimbursement of the full amount of recovery, even pending a request for waiver or appeal, was "neither rational nor consistent with the statutory scheme providing for waiver and appeal rights."[5] According to the Court, that practice "unnecessarily chills" a Medicare beneficiary's right to seek a waiver or dispute the amount claimed, and "reaches beyond the fiscal objectives and policies" behind the reimbursement statute.[6]

The second issue raised in the *Haro* litigation concerned Medicare beneficiaries' attorneys. Attorneys were informed by CMS that its recovery would need to be paid within 60 days of their receipt of the settlement funds, or interest would begin to accrue and actions to collect the recovery amount would be pursued. The beneficiaries' attorneys were advised that Medicare's claim needed to be "paid up front out of settlement proceeds before any distribution of the settlement could occur".[7] The Secretary asserted the Medicare Secondary Payer Act authorized her to recover from any entity that had received payment from a primary plan. The Court found no case law to support a direct right of recovery against claimants' attorneys. It acknowledged the argument that it would not be in a client's best interest for an attorney to pay Medicare a recovery amount that was incorrectly calculated. The Court distinguished the Secretary's ability to assert a direct right of recovery against plaintiff's counsel from the right of subrogation under the Medicare Secondary Payer Act and the common law, and limited its ruling only to the asserted direct cause of action. Based on those principles, the Court found the Secretary could not prevent plaintiff's attorneys from distributing **undisputed** portions

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of settlement proceeds to their beneficiary clients.

Court Took Interest in Interest

The demand letters sent by Medicare explained that if the recovery amount was not paid within 60 days after Medicare received notice that payment had been or should have been made, the Secretary would charge interest until reimbursement was made. Interest would be assessed at the rate of 11.375 percent. The Medicare beneficiaries challenged the "extremely high" rate at which interest was being imposed.[8]

The Court explained that the Medicare Secondary Payer Act specifically provided for interest to accrue from the time of notice of the settlement. It concluded the rate of interest assessed by CMS was "both authorized and rational." The Court provided a practice-pointer to parties by stating the Medicare Secondary Payer Act provides: "strong incentive for beneficiaries to pay what they owe Medicare prior to expiration of the 60-day time period, leaving only the disputed portion of the claim unpaid."

The Effect of the *Haro* Decision

The demand letters sent to Medicare beneficiaries now explain that Medicare will not initiate any recovery action while an appeal or request for waiver is pending.[9] As suggested by the Court in *Haro*, Medicare beneficiaries need to give careful consideration to paying the **undisputed** portion of Medicare recovery in order to avoid accrual of interest.

Medicare continues to aggressively pursue conditional payment recovery from any and every possible source. Insurance carriers and self insured entities need to ensure Medicare's recovery is promptly paid at the time of settlement or when a judgment or award is entered. When possible, payment of Medicare's conditional payment recovery should be made directly. When a Medicare beneficiary receives payment for conditional payment recovery and fails or refuses to reimburse Medicare, Medicare can pursue a recovery claim against the primary plan, even if the primary plan has already paid the beneficiary.[10] That aspect of the recovery process hasn't changed, but should be considered whenever conditional payment issues are discussed.

An appeal has been taken from the *Haro* decision. Whether the Secretary succeeds in overturning the trial level decision or not, changes continue to take place in the structure of the CMS and as to the policies and procedures of the Medicare program.

Be aware that federal legislation has been proposed to address issues that arise under the Medicare Secondary Payer Act.[11] The proposed legislation has garnered bipartisan support as Medicare beneficiaries involved in claims of personal injury and primary payers seek certainty in the settlement process and finality of settlements once disputes are resolved. You will be best positioned to advise clients about issues that arise under the Medicare Secondary Payer Act if you continue to keep informed about developments in case law, administrative practices and procedures, and legislative proposals.

NOTICE

The purpose of this paper is to contribute to an educational program for the study, discussion and dissemination of information relating to the study and practice of legal issues concerning the Medicare Secondary Payer Act and associated legal authorities. It is not intended to constitute legal advice. The views, conclusions or statements of law which may be expressed by the author of this paper or verbally during the presentation of this paper should be viewed only as source materials requiring independent research for confirmation of accuracy. The applicability of the information contained in this paper must be evaluated on a case by case basis. It cannot substitute for legal advice.■

1 *Haro v. Sebelius*, 2011 WL 2040219 (D. Ariz. 2011).
2 42 U. S.C. § 1395y.
3 42 U.S.C. § 1395y(b)(2).
4 42 U.S.C. § 1395y(b)(2)(B)(iii).
5 *Haro v. Sebelius*, 2011 WL 2040219 (D. Ariz. 2011) at 11.
6 *Haro v. Sebelius*, 2011 WL 2040219 (D. Ariz. 2011) at 11.
7 *Haro v. Sebelius*, 2011 WL 2040219 (D. Ariz. 2011) at 5, at 12.
8 *id.*
9 Beneficiary Workers' Compensation Demand Letter [SGLDBWNGHP] available at www.msprc.info.
10 42 C.F.R. § 411.24(h), (a)(1).
11 H. R. 1063, Strengthening Medicare and Repaying Taxpayers [SMART] Act, introduced in the House of Representatives on March 14, 2011. Additional information available at www.thomas.gov

MESSAGE FROM THE PRESIDENT

Greg G. Barntsen

MEMBERS OF IDCA---I WANT TO HEAR FROM YOU!

As President, I want to hear from the members of the IDCA membership to help the IDCA better serve your needs as defense counsel.

As I embark on my term as President of the IDCA I do so with several goals in mind to strengthen the organization and enable it to better serve its members. Since I believe the strength of any organization comes from its members, Board of Directors and Officers and their involvement and participation in the organization I am reaching out to each of you for suggestions on how the IDCA can better serve each of your needs as defense counsel. For me, to accomplish that goal I need to hear from you through emails, phone calls, or letters to me, your District Representative, other Officers of IDCA, or staff of this organization. Don't let your voice be silent if you have suggestions on ways to improve this organization and ways to better communicate with you.

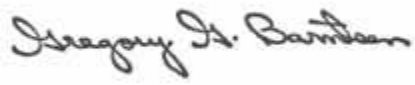
In order to begin the process of strengthening the organization and serving its members needs, the Board of Directors has scheduled a Strategic Planning meeting on December 2, 2011, to determine what should be the goals of the organization and how to achieve those goals in 2012 and coming years. One of the IDCA's goals will be to revitalize and reorganize the IDCA committee structure by determining which committees should be active and what new committees are needed to serve our membership. Once that is accomplished we will be seeking membership involvement on each committee. I also will be studying how the IDCA can improve on the quality and type of legal education seminars and how we can provide the seminars to members in an economical manner.

Please help me and your Board of Directors better serve your needs by contacting us with your suggestions for the IDCA before our strategic planning meeting on December 2, 2011. What do you think are IDCA's strengths, weaknesses, opportunities, and threats?

What CLE topics are of interest to you?

How can IDCA better communicate with you?

What services would you like to see IDCA provide to you?



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EXCEPTIONS TO THE ECONOMIC LOSS RULE POST *ANNETT HOLDINGS, INC. V. KUM & GO, L.C.*

Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499 (Iowa 2011) (filed July 8, 2011).

By Carol J. Kirkley, Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, Iowa

Carol J. Kirkley

The Iowa Supreme Court in an opinion written by Justice Mansfield addressed whether the plaintiff's negligence claim is barred by the economic loss rule. The district court entered summary judgment in favor of the defendant, ruling that the economic loss rule bars the negligence claim and that the trucking company's parent was not a third-party beneficiary of the contract between the card issuer and the truck stop. The Iowa Supreme Court affirmed the grant of summary judgment to Kum & Go, L.C. on Annett Holdings, Inc.'s negligence claim.

This case arose from the fraudulent conduct of a trucking company employee, Michael Vititoe. Annett Holdings, Inc. is an Iowa holding company. One of its subsidiaries is TMC Transportation which is a trucking company. Annett entered into a contract with Comdata pursuant to which Comdata provided credit cards that could be used by Annett employees to purchase fuel and obtain cash advances at Comdata authorized service centers. In part, the contractual agreement between Annett and Comdata provided that Annett agreed to be fully responsible for the unauthorized or fraudulent use of the cards and included a provision whereby Annett was to hold Comdata harmless from any and all liability resulting from the acts of employees or agents of Annett.

Comdata entered into a contractual relationship with Kum & Go, L.C. that enabled a particular Kum & Go store in Oskaloosa to handle Comdata transactions. This contract included detailed procedures which governed how Kum & Go was to process the Comdata transactions.

TMC employed Michael Vititoe from November, 2002 until April, 2006. During the course of his employment, Vititoe engaged in fraudulent transactions using his company issued credit card which totaled $298,524.79. Vititoe went to the Kum & Go in Oskaloosa on an almost daily basis. Store personnel allowed Vititoe to operate the Comdata terminal himself. Vititoe managed to steal money by entering fuel purchases on the Comdata machine and submitting cash advance slips printed out by the machine to store clerks – who then paid Vititoe in cash. Store personnel wondered why he was getting cash back while reporting fuel purchases. He claimed that he was a "regional supervisor" and needed cash to pay for other employees' fuel purchases because the other employees did not have credit cards of their own. In March, 2006, a new fuel manager took over and discovered Vititoe's fraudulent transactions. Vititoe was then charged with first degree theft and was subsequently convicted of theft and ordered to pay restitution in the amount of $298,524.79.

In affirming the district court's grant of summary judgment, the court's analysis of this issue focused on the fact that no one was injured and the fact that no property was destroyed, but rather the nature of the loss was purely economic. Moreover, the court focused on the contractual relationship between Annett and Comdata and Comdata and Kum & Go, L.C. In so doing, it focused on the fact that Annett had contracted to assume certain risks of financial loss and had the ability to minimize those risks.

The court also focuses on the policy implications of the economic loss rule. The court states that "as a general proposition, the economic loss rule bars recovery in negligence when the plaintiff has suffered only economic loss" (citing *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984), *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503 (Iowa 2011)). Further, "[t]he well-established general rule is that a plaintiff who has suffered only an economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Id.* The opinion is largely focused upon the "boundary-line function" of the economic loss rule which states, in essence, when parties have sustained economic loss pursuant to contract they should not be allowed recovery under a tort. *Id.* The court notes that the doctrine of economic loss has not been limited to situations where the plaintiff and defendant are in direct contractual privity. *Id.* at 504.

In this opinion, the court appears to be broadening the scope of the economic loss doctrine; however, while the court declined to "delineate the precise contours of the economic loss rule," it affirmed previously established exceptions such as the remoteness of the economic loss and actions for professional negligence. *Id.*

In the course of its analysis, the court noted its historical use of the following factors to be considered in whether or not to apply the economic loss rule: 1) the nature of the defect, 2) the type of risk, 3) the manner in which the injury arose, and 4) the type of damages sought by the plaintiff. *Id* at 506. The court went onto to say "[i]t is not clear to us that the Determan/Nelson factors are relevant when the claim is for negligence resulting only in financial harm." *Id.* The court found that there were a number of characteristics that brought Annett's cause of action within the scope of economic loss rule such as the fact that there was no risk of physical harm, there was no defect, the ability to prevent the loss, and the hold harmless provision in the contract. *Id.*

The Iowa Supreme Court's analysis of the application of the economic loss rule in *Annett Holdings* is very similar to the analysis employed by the district court in *Banknorth v. BJ'S Wholesale Club, Inc.*, 442 F. Supp.2d 209 (N.D. Pa 2006). In *Banknorth*, the district

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EXCEPTIONS TO THE ECONOMIC LOSS RULE POST *ANNETT HOLDINGS, INC. V. KUM & GO, L.C.* ...

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court applying Maine law in an action by a credit card issuing bank against a merchant for negligence in maintaining the merchant's computer files of debit card members found that the economic loss rule barred the issuer's claim that the merchant negligently failed to protect cardholder information. *Id.* Therefore, the district court entered summary judgment in favor of the defendant. *Id.* In so doing, the district court in its analysis of the issue focused on the contractual relationships between the various corporate entities and their ability to negotiate the risk of loss as well as the public policy of resolving commercial disputes in accordance with commercial law rather than according to tort principles designed for accidents that cause personal injury or property damage. *Id* It is noteworthy that both of these cases involve fraudulent credit card transactions in the context of complex, interrelated, contractual relationships between large corporate entities who have the ability to identify, negotiate, and allocate the risk of loss associated with the contractual relationships at issue.

Justice Wiggins authored a dissenting opinion in *Annett Holdings* that was joined by Justice Hecht which sets forth three central arguments. Firstly, Annett Holdings, Inc. did not have a contractual relationship with Kum & Go, L.C. *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d at 511. Therefore, Annett did not have the ability to allocate the risk of loss pertaining to Kum & Go, nor did it have the ability to bring suit against Kum & Go under a theory of breach of contract. *Id.* Secondly, Kum & Go, L.C. was providing a service by processing these transactions just as an attorney or an accountant does for a client. *Id.* at 512. Therefore, Kum & Go had an independent duty to use ordinary care in the processing of the purchases made with Annett's credit card. *Id.* Thirdly, the court's prior cases involve products that fail to perform as expected. Annett is claiming that Kum & Go was negligent in the processing of credit card transactions. *Id.* Indeed, Kum & Go had a duty independent of a statute to operate and oversee the use of the credit cards. *Id.* The claims asserted by Annett are very different than those presented in prior cases and are more akin to a claim for malpractice. *Id.* Thus, the dissent argued the economic loss rule should not be applied.

In affirming the grant of summary judgment to the defendant, the majority opinion did not provide any specific guidance as what the court would consider in applying the economic loss rule aside from its affirmation of existing precedent on the issue. *Id.* at 504. In contrast, the dissenting opinion does set out factors as well as policy considerations pertinent to the analysis of the application of the rule. *Id.* at 513. It is noteworthy that the commentators have made the observation that there is not a universal economic loss rule and, consequently, the rule is applied very differently across the various jurisdictions. *See generally* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 Wash. & Lee L. Rev. 523 (2009), Rebecca Hatch Weston, *Liability of Retailer and its Affiliate Bank to Credit Card Issuer for Costs Arising out of Breach of Retailer's Computer Security*, 51 A.L.R. 6TH 311 (2010). In view of the diverse manner that this rule is applied across the country, to find additional exceptions to this rule, it is worthwhile to take a second look at some of the arguments which were rejected by the majority in *Annett* as these arguments might be adopted by the court if presented in a different factual scenario in addition to the material developed by the commentators.

One potential exception is the *lack of bargaining power.* This exception has been adopted in Massachusetts, Illinois, and other jurisdictions. *See Clark v. Rowe*, 701 N.E.2d 624, 626 (Mass. 1998), *Collins v. Reynard*, 607 N.E.2d 1185, 1189 (Ill. 1992): Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule,* 66 Wash. & Lee L. Rev. 523, 581-583 (2009). The essence of this exception is that the party was not in a position to allocate risk of loss. *Id.*

Another potential exception is that of *independent duty* which was not adopted by the majority in *Annett*. The theory of *independent* duty has been adopted as an exception to the economic loss rule in a number of jurisdictions such as Colorado and Florida. *See generally*, *Consolidated Hardwoods, Inc. v. Alexander Concrete Constr., Inc.*, 811 P.2d 440, 443 (Colo. App. 1991), *Alma v. Azco Construction, Inc.*, 10 P.3d 1256 (Colo. 2000), *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), and Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule,* 66 Wash. & Lee L. Rev. 523, 566-567 (2009).

Also, look to the public policy and the historical development of the economic loss rule to find support for exceptions to its application. This is a rule which emerged largely from the development of products liability and has gradually evolved into the law of contracts. *See generally*, *Alma v. Azco Construction, Inc.*, 10 P.3d 1256 (Colo. 2000), *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule,* 66 Wash. & Lee L. Rev. 523 (2009). Indeed, it has been said of this rule that it developed to prevent tort law from "swallowing" the law of contracts. *See Alma v. Azco Construction, Inc.*, 10 P.3d 1256, 1260 (Colo. 2000); *See generally Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule,* 66 Wash. & Lee L. Rev. 523 (2009). Finally, develop your arguments in the context of the source of the duty between the parties: i.e. is the source of the duty the contractual arrangement between the parties or a duty which has its foundation in the law of tort. ■

CELLULAR PHONES AND PUNITIVE DAMAGES

By Ted Wallace, American Family Mutual Insurance Company, Davenport, IA

It has become commonplace for motorists to use cellular phones while driving upon the roadways. A glance around while stopped at any busy intersection will generally reveal one or more people engaged in conversation with someone not in their car. According to the Insurance Institute for Highway Safety, the State of Iowa does not have a general ban on use of hand-held cellular phones while operating a motor vehicle. There is, however, a ban for individuals with learner's permits and intermediate license holders. Further, Iowa has a texting ban for all drivers. There are presently bans on hand-held phone use for all drivers in all driving situations in ten states as well as the District of Columbia.

The purpose for the ban or restriction on cell-phone use while operating a motor vehicle seems fairly intuitive. A driver that may be distracted by a cell phone could be at greater risk for causing an accident. A recent study conducted by Strayer et al., found in a high-fidelity driving simulator that, while driving, cell-phone users exhibit greater impairment than intoxicated drivers. Other studies have found that use of cell phones is a greater distraction by older drivers as opposed to younger drivers.

Despite what appear to be obvious risks in talking on a cell phone while driving, courts have had very little experience with punitive damage claims in accidents that were arguably caused or contributed to by cell phone use. At the time of writing this article, no Iowa appellate case has been reported which either allowed or disallowed a punitive damage claim arising out of cell phone use.

Other jurisdictions have had lower appellate court decisions which permit punitive damages in this situation. For example, in *Pennington v. King*[1], a federal district judge ruled testimony that the Defendant was distracted by his cellular phone conversation, and was therefore operating his tractor-trailer in a wildly erratic manner, may support a finding of conduct which would satisfy the punitive damages standard in Pennsylvania. In *Howell v. Kusters*[2], a Delaware Superior Court ruled that evidence of cell phone use, coupled with testimony that the Defendant was driving 20 miles an hour over the speed limit and drove through a red light without braking or taking evasive action was legally sufficient to permit addition of a punitive damages claim. While not in the context of civil liability, in *People v. Hyun*[3], the court determined that excessive speed, in conjunction with cell phone use, admittedly driving in a hurry, and not paying attention to the road, were enough to support a conviction for involuntary manslaughter. In addition to the preceding court decisions, at least one published article has argued for the use of punitive damage awards as a deterrent to driving while talking on a cell phone.

Conversely, in *Lindsey v. Clinch County Glass*[4], the Georgia Court of Appeals held that an injured driver could not recover punitive damages against an at-fault driver who was looking up a telephone number on his mobile phone at the time of the accident. That court found this conduct did not rise to the level of aggravation or outrage necessary to support a punitive damages claim under Georgia law. In *Anderson v. Foglesong*[5], the Plaintiff alleged a punitive damage claim in part due to a struggle for a cellular phone occurring within the vehicle at the time of an accident. While the Minnesota court found this conduct negligent, they did not find that it rose to a level of deliberate disregard for the Plaintiff and did not permit a punitive damages claim. In *Harris v. JSK Enterprises, Inc.*[6], the court did not permit a Plaintiff to mention or argue punitive damages during voir dire or opening statements until such time as she had established a prima facie case for such damages. The trial court directed a verdict for the Defendant on this issue despite evidence of cell phone use which was upheld by the Arkansas Court of Appeals. Finally, in an interesting role reversal, an Oklahoma court found that the mere use of a cell phone by a plaintiff involved in an automobile accident did not, standing alone, create an issue of fact as to whether or not the driver was guilty of contributory negligence.

The question, then, is what would an Iowa appellate court do faced with the issue of whether or not use of a cellular phone could give rise to a claim for punitive damages if such use caused or contributed to a tort. To answer this question, an analysis of Iowa legal standards for punitive damage claims would be appropriate. Further, a review of the types of conduct which give rise to punitive damages can provide insight into how the court may view this issue. Finally, there is the policy question of whether or not the court should permit punitive damages to proceed in cases of this nature.

Punitive damage awards in Iowa are governed in large measure by Iowa Code § 668A. Under this statute, punitive damages are available when shown by a preponderance of clear, convincing, and satisfactory evidence that the conduct of a defendant constituted a willful and wanton disregard for the right or safety of another. Exactly what these terms mean, however, is obviously subject to interpretation. The Supreme Court of Iowa has defined this to mean that an "actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was

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[1] *Pennington v. King*, 2009 WL 415718 (E. D. Penn. 2009).
[2] *Howell v. Kusters*, 2010 WL 877510 (S. Ct. Del. 2009).
[3] *People v. Hyun*, 1996 WL 33348862 (Mi. 1996).
[4] *Lindsey v. Clinch County Glass*, 2011 WL 4057533 (Ga. 2011).
[5] *Anderson v. Foglesong*, 2009 WL 8910489 (Mn. 2009)
[6] *Harris v. JSK Enterprises*, 2009 WL 2397837 (Ark. 2004).

CELLULAR PHONES AND PUNITIVE DAMAGES... *CONTINUED FROM PAGE 8*

so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." Based upon this standard, it is clear that merely objectionable conduct does not fall within the definition of willful and wanton. Further, simple negligence is not sufficient to support a claim for punitive damages. It becomes important, then, to understand what conduct would be considered "willful and wanton," based upon past decisions, to determine if cellular phone use while driving should be so considered.

One of the easiest situations in which conduct is considered "willful and wanton" is the drunk driver. By 1954, the Supreme Court of Iowa had classified drunk driving as a basis for awarding punitive damages, even without a specific finding of malice. Many cases have followed which have agreed with this principle. As noted in *Sebastian*[7], one of the reasons for so finding was due to the fact that operation of a motor vehicle while intoxicated is in violation of Iowa law.

Another case in which punitive damages were appropriate was *Briner v. Hyslop*[8]. *Briner* was a wrongful death action arising out of an automobile-truck collision. It was alleged that the driver of the truck, as well as the corporation which he drove for, were guilty of willful and wanton conduct. The conduct alleged was that he operated his truck for a period of time substantially in violation of Iowa Code § 321.255, that he did so intentionally, and that he took stimulants to stay awake. The court found that his taking of stimulants evidenced knowledge of his tired condition and that he disregarded this condition by continuing to drive in violation of the statute. Further, the court found that evidence that Hyslop's manager was fully aware of these habits, provided no supervision or training, and essentially disregarded the actions of its employees, were sufficient to make out a jury question on punitive damages.

Other cases where punitive damages have been permitted generally involve an intentional or obviously wrongful conduct, which formed the basis for the award. For example, in *McClure v. Walgreen Co.*[9], the evidence showed that an improperly filled prescription occurred at a store where there was admitted understaffing, repeated errors similar to the one in this case known to the store, and that no action was taken by the store to correct the risk of repeating such an error. In *Webner v. Titan Distribution, Inc.*[10], an award of punitive damages was permitted against a business for retaliatory discharge. In *Wolf v. Wolf*[11], a spouse was awarded punitive damages against his ex-wife because she interfered with his child custody rights as well as violating a contempt order. In *Wilson v. Vanden Berg*[12], an attorney's breach of contract and fraud perpetrated upon a client was held sufficient to award punitive damages.

In the main, it appears that most of the cases in Iowa which involve an award of punitive damages contain either elements of intent, such as retaliatory discharge or violation of a contempt order, or a violation of Iowa law, such as driving while intoxicated or driving excessive time by a tractor-trailer operator. Cases involving conduct of this type, undoubtedly, should have the possibility of punitive damages. However, there are other types of cases where punitive damages have been sought but denied by the courts.

In *Vipond v. Jergensen*[13], an automobile passenger brought an action against the vehicle owner due to an accident caused by the driver. This case was brought under Iowa's former Guest Statute which required reckless operation before liability could attach. Reckless operation was defined to mean more than mere negligence. The evidence in this case was that the driver did not stop for a stop sign despite having knowledge of the presence of the sign and a warning from a passenger. The Court held that failure to stop at a stop sign did not in and of itself constitute recklessness. The Court held that unless there was evidence present to show a no-care attitude, knowledge of the misconduct, plus a disregard for the consequences, then there is no proof of recklessness.

The Iowa Court of Appeals followed the lead of the Supreme Court of Iowa in *Loftsgard v. Dorrian*[14]. That lawsuit was brought by the parents of an automobile accident victim against the driver and owner of a vehicle in which he was a passenger. The driver in that case admittedly ran a stop sign which resulted in the death of Scott Loftsgard. However, as there was no evidence that the action was taken in a willful, wanton or malicious manner, the punitive damages claim could not be submitted to the jury.

Another driving case analyzing conduct which could be considered "gross negligence" is *Allied Mut. Ins. Co. v. State*[15]. The lawsuit involved an accident between a vehicle insured by Allied and one driven by a State of Iowa employee. The state employee came to an intersection under construction and slowed his vehicle, but did not stop, before entering the intersection through a stop sign. An accident occurred in the intersection with an Allied in-

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[7] *Sebastian v. Wood*, 66 N.W. 2d 841 (Iowa 1954).
[8] *Briner v. Hyslop*, 337 N.W. 2d 858 (Iowa 1983).
[9] *McClure v. Walgreen Co.*, 613 N.W. 2d 225 (Iowa 2000).
[10] *Weber v. Titan Distribution, Inc.*, 101 F. Supp 2d 1215 (N.D. Iowa 2000).
[11] *Wolf v. Wolf*, 690 N.W. 2d 887 (Iowa 2005).
[12] *Wilson v. Vanden Berg*, 687 N.W. 2d 575 (Iowa 2004).
[13] *Vipond v. Jergensen*, 148 N.W. 2d 598 (Iowa 1967).
[14] *Loftsgard v. Dorrian*, 476 N.W. 2d 730 (Iowa 1991).
[15] *Allied Mut. Ins. Co. v. State*, 473 N.W. 2d 24 (Iowa 1991)

CELLULAR PHONES AND PUNITIVE DAMAGES... *CONTINUED FROM PAGE 9*

sured. According to Justice Carter's opinion, "[f]ailure to stop at a stop sign or to maintain a proper lookout does not indicate an enhanced state of negligence."

Wilcox v. Hilligas[16] involved a situation in which there was inattentive driving which led to an accident. The issue was whether or not such inattention could constitute reckless conduct. Factually, the driver was alleged to have been kissing his front seat passenger as the vehicle left the roadway. The vehicle went into the ditch, did not slow its speed and did not change course before striking a driveway that caused injury to the Plaintiff. The Court, in noting that this was "our first kissing case," held that an inference of recklessness could not be had under the facts of this case. The Court reasoned that it was common knowledge that "young drivers kiss their girlfriends while driving, and have since the advent of the automobile," but that such conduct would not go beyond a claim of negligence.

The line of cases which did not allow punitive damage or a finding of reckless operation seem to suggest that something much more serious than a simple driving error is necessary to give rise to a punitive damages claim. For example, in *Briner* and *Sebastian* the evidence included violations of more than the rules of the road. In *Wood*, the evidence included a willful violation of a court order and finding of contempt. In *McClure*, the claim was premised upon the willful disregard of a risk of harm that the company was aware of, as evidenced by thirty-four prior "mistakes" of the same type which injured the Plaintiff.

Conversely, the cases which have disallowed punitive damages or found that there was no reckless conduct involved what could be classified as simple driving errors. In *Vipond* and *Loftsgard*, the unintentional running of a stop sign was unable to support a punitive damages claim. In *Allied*, such conduct did not rise to the level of reckless conduct. In *Wilcox*, which was essentially a failure of lookout and control, the court did not permit a claim of punitive damages to survive.

The question becomes this: Does a simple garden variety accident involving a driver who was using a cell phone at the time of the accident give rise to a claim for punitive damages?

From the pro-punitive perspective, it is not disputed that the driver voluntarily engaged in talking on the cell phone prior to an accident. The argument is that by choosing to engage in a cell phone conversation while driving is to disregard a known risk, making it highly probable that harm would follow. However, unlike drunk driving, for example, the mere conduct itself is not illegal. It would also be a stretch for a Plaintiff to establish that the driver had a conscious disregard of the consequences when they are engaging in legal conduct.

[16] *Wilcox v. Hilligas*, 117 N.W. 2d 42 (Iowa 1962).

Arguably, talking on a cell phone while driving is a situation more closely aligned with cases that find inattention to the roadway does not rise to a level where punitive damages can be awarded. Practically speaking, the reason an accident might occur during cell phone use would be the inattention of the driver to the road. Similar types of inattention, whether due to "kissing a passenger," or changing the radio station, or attending to a rear-seat child, do not seem to be egregious, unusual, or unexpected conduct which should permit a punitive damages claim. Inattention which causes a driver to miss a stop sign is not grounds for punitive damages. Such inattention due to the use of cell phone would be a similar quality of negligence and, accordingly, should not be subject to a claim for punitive damages.

CONCLUSION

It was the purpose of this article to discuss existing case law relative to claims for punitive damages against drivers who were involved on the cell phone at the time of the collision. No Iowa appellate cases have made any holding in this regard although there are cases of other jurisdictions which respond in each direction. It does appear, however, that based upon prior Iowa precedent in regard to punitive damages, that talking on the cell phone is conduct more akin to a driving error or mistake than the illegal conduct of, for example, driving while intoxicated. ■

IDCA SCHEDULE OF EVENTS

December 8, 2011
Jury Selection Methodology Webinar
12:00 Noon – 1:30 p.m.
Webinar
See page 11 for registration details.

September 13 – 14, 2012
48th Annual Meeting & Seminar
8:00 a.m. – 5:00 p.m.
Watch for details in Summer 2012.

IDCA WELCOMES NEW MEMBERS

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Iowa Defense Counsel Association Webinar
"Jury Selection Methodology"
THURSDAY, DECEMBER 8, 2011
12:00 Noon to 1:30 p.m.

The Iowa Defense Counsel Association invites you to participate in a continuing education webinar. Participants will access the webinar from their computers for video and audio. **A unique link for the webinar will be distributed before the webinar date.**

Program: Jury Selection Methodology
Speaker: Bill Kanasky, Jr., Ph.D., CSI Litigation Psychology, LLC, Chicago, Ill.

The science and art of jury selection will be examined through a discussion of outcome determinative factors that should be explored during the voir dire process. Techniques for achieving the primary goals for voir dire will be covered. Case specific ideal and adverse juror characteristics and how to assess for them will be discussed. The use of mock jury research and juror questionnaires for establishing voir dire strategy and jury selection success will be discussed. Finally, tips will be provided for identifying jurors who should have the greatest latitude of acceptance of the case themes and issues.

About Bill Kanasky, Jr.: Dr. Kanasky's experience includes providing top-quality litigation research and consultation to defense counsel involved in civil lawsuits. Bill has expertise in all aspects of trial science, including jury research, sampling methods, juror profiling, juror questionnaire and voir dire development, jury selection, opening statement construction, case strategy analysis, and persuasive visual aid creation. Bill has been an invaluable part of many defense teams, especially in cases related to medical malpractice, product liability, and wrongful death. Two recent cases that he provided litigation research and consultation services were voted as "Top 10 Defense Verdicts of 2004" by the *National Law Journal*. Further, Bill has been a faculty member at several trial academies, such as the 2009 International Association of Defense Counsel (IADC) Trial Academy where he taught on voir dire development, jury selection methodology, and witness preparation.

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IDCA ANNUAL MEETING RECAP

The 47th Iowa Defense Counsel Association's Annual Meeting & Seminar was September 15 – 16, 2011, at the West Des Moines Marriott in West Des Moines, IA. Nearly 200 attorneys from throughout the state gathered for two days of education and networking.

Following are some highlights.

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Outgoing President Stephen Powell (left), is presented with the IDCA President's Award by Gregory G. Barntsen (right), incoming President.

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Seitzinger Award Presented to Gregory Witke

In 1988, IDCA president Patrick Roby proposed to the board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and its first president and for his continuous and complete dedication to the IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, which was dubbed "The Eddie Award."

Edward Seitzinger was an attorney with Farm Bureau and besides his family and work, IDCA was his life. This award is presented annually to the board member who contributed most to the IDCA during the year. It is considered IDCA's most prestigious award.

The very deserving recipient of the Eddie Award for 2011 is Gregory A. Witke, Patterson Law Firm, in Des Moines, IA. Witke has served in many ways for IDCA, including the Legislative Committee Chair. Witke played a critical role in securing the services of IDCA's new lobbyist, Scott Sundstrom, in the fall of 2010.

Congratulations, Greg!

Robert M. Kreamer Award

Following the death of IDCA's long-time Executive Director and Lobbyist, Bob Kreamer, on October 1, 2010, the IDCA Board of Directors voted unanimously to rename its Public Service Award the Robert M. Kreamer Award. The award is presented to an individual who has gone above and beyond in their efforts to improve the administrative of civil justice in Iowa.

The IDCA Board of Directors found it fitting to present the first Robert M. Kreamer Award posthumously to Bob. His wife, Donna Kreamer, and two sons, attended the IDCA Dinner and Awards to accept this award.

Past award recipients include:

- Kraig Paulsen, State Representative, 2004
- Maggie Tinsman, State Senator, 2004
- Honorable Louis Al Lavorato, Chief Justice, Iowa Supreme Court, 2006
- Robert M. Hogg, State Senator, 2010
- Robert M. Kreamer, IDCA Executive Director and Lobbyist, 2011

Megan Antenucci (right)presents outgoing President Stephen Powell (left) with the DRI Presidential Award.

IDCA recognized three outgoing board members at the IDCA Dinner and Awards program.

Michael P. Jacobs, Rawlings, Nieland, Killinger, Ellwanger, Jacobs, Mohrhauser & Nelson, L.L.P. in Sioux City, served on the IDCA Board of Directors for six years as District III Representative.

David H. Luginbill, Ahlers & Cooney, P.C., in Des Moines, served on the IDCA Board of Directors for six years as an At-Large Representative.

Henry J. Bevel, III, McCoy, Riley, Shea and Bevel, in Waterloo, served on the IDCA Board of Directors for six years as an At-Large Representative.

Thank you, Michael, David and Henry, for your long-standing commitment to the Iowa Defense Counsel Association.